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Appellants,

vs.

THE WICHITA BOARD OF TRADE, et. al.,

Appellees.

On Appeal From The United States District Court For The District of Kansas

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MOTION TO AFFIRM OF WICHITA BOARD OF TRADE, et. al.

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In the Supreme Court of the United States

Nos. 72-214 and 72-433

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
and **INTERSTATE COMMERCE COMMISSION**,

Appellants,

vs.

THE WICHITA BOARD OF TRADE, et. al.,

Appellees.

On Appeal From The United States District Court For The District of Kansas

MOTION TO AFFIRM OF WICHITA BOARD OF TRADE, et. al.

Appellees, Wichita Board of Trade, *et al.*, listed in Appendix I hereto, respectfully move, pursuant to Rule 16 of the Rules of this Court. that the order of the dietriet court in this case be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further briefing or oral argument.

STATEMENT

These appeals arise out of an attempt by the railroads to remove the service of grain inspection* from their services historically embraced by the line-haul rates in the West and to establish an additional charge for such service. Their proposal drew broad opposition from the grain industry, including most of these appellees who, collectively, speak for the grain exchanges and thousands of farmers, country elevators, grain companies and merchants in the West. On the basis of protests, the Interstate Commerce Commission initiated an investigation into these tariff changes in a proceeding where the burden of proof was placed upon the railroads by statute to show that the changes proposed are just and reasonable. The Commission suspended the tariffs for the seven month-period allowed to it during its investigation.

The railroads were inspired to make this proposal by an amendment made to the United States Grain Standards Act (7 U.S.C. § 71 *et seq.*) in 1968 whereby a statutory requirement that every car of grain be inspected was removed. That amendment was supported by the grain trade, including these appellees, in order to obviate certain inspections which had served no purpose, e.g., intra-company shipments. No representations were made to Congress by the railroads or anyone else that the amendment was needed to withdraw inspection from the services

* The railroads do not perform the grain sampling inspection service. The service is performed by state-licensed grain inspectors paid by shippers to determine the grade and condition of the grain. The railroads merely make the cars available for a few hours for that purpose.

provided under rail rates or as justification for a penalty charge. The Commission correctly concluded here that:

> Neither the provisions of the revised Grain Standards Act nor the legislative history indicates that improved car utilization was the primary factor in the enactment of the 1968 statute (App. A-11*).

Nevertheless, the railroads proceeded in the case before the Commission to forecast an improved car supply from their proposal and placed primary emphasis on that claim, either to distract the Commission from the legal issues** involved or simply to gain the Commission's sympathy. They urged that the purpose of the additional charge is to serve as a barrier against inspections and to eliminate all or most of the inspections. The evidence of the grain trade showed that this penalty would destroy the grain marketing system (including many small businesses engaged in it) which had been established for decades; and that the penalty charge would have to be borne by the farmers who could ill-afford it.

During the investigation and prior to the date of the Commission's administratively final decision (September 21, 1971), the seven month-suspension period allowed to the Commission for its investigation had passed and the railroads placed the new charges into effect. The Commission ultimately decided that the tariff changes had been proved to be just and reasonable and, accordingly, allowed them

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* References herein are to Appendices A to F of the railroads' Jurisdictional Statement.

** An indication of the railroads' success in circumventing the legal issues concerning the new charge is evident from the expression in the report by the Chairman of the Commission that the car supply argument served, in part, "to quiet the doubts held concerning the legal aspects" of this proposal (App. B-8).

to remain in effect.* (App. B-9) These appellees then brought an action to set aside the Commission's report and order which allowed the charges to continue in effect.

The Court below (1) set aside the Commission's decision on the grounds that it had misinterpreted the statutory burden of proof in this case which requires evidence establishing that the combination of the existing rates, which concededly compensated the railroads for the inspection service, plus the new charge would be just and reasonable and (2) since no evidence had been submitted by the railroads to that effect, remanded the matter to the Commission "for further proceedings consistent with this opinion" and ordered that the "charges are suspended and shall be ineffective until and unless otherwise ordered by this Court".

The railroads filed their Notice of Appeal and, in the closing hours of the 1971 Term, obtained a stay under which the charges are presently in effect. Several weeks later, the Commission filed its Notice of Appeal. Notably, while the railroads attack both the merits of the opinion and the enjoining of the charges, the Commission challenges only the power of the Court below to enjoin the charges.

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* Commissioner Gresham dissented on the grounds that in order for the railroads justly and reasonably to establish an additional charge for inspection they must contemporaneously reduce by a commensurate amount the line-haul rates, inasmuch as they included compensation for that service (App. B-8).

QUESTIONS PRESENTED

1. Whether the Court, upon deciding that the Commission had misinterpreted the railroads' statutory burden of proof in a case where no evidence was submitted to meet their burden, had the power to enjoin the new charges and restore the *status quo*.

2. Whether the Court was correct in holding that the railroads are not relieved from their statutory burden of showing that the combined rates and charges would be just and reasonable because a great number and variety of rates are involved.

3. Whether the continuing existence of certain line-haul rates, prescribed thirty-seven years ago by the Commission and increased by the railroads many times since then, relieved the railroads of their burden of producing evidence of the justness and reasonableness of all the various rates affected by this proposal today.

I.

THE DISTRICT COURT HAD THE POWER TO SUSPEND OR ENJOIN THE NEW CHARGES UPON CONCLUDING THAT THE COMMISSION'S APPROVAL, WHICH ALLOWED THEM TO BE IN EFFECT, WAS BASED UPON AN ERRONEOUS INTERPRETATION OF THE RAILROADS' BURDEN OF PROOF.

Both the Commission and the railroads are here making essentially the argument: that Section 15 (7) of the Interstate Commerce Act (49 U.S.C. § 15 (7)) precludes a district court from suspending or enjoining the new charges after reviewing and setting aside a Commission decision that they are just and reasonable and that this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963) so interpreted Section 15 (7). Neither proposition is correct.

Section 15 (7) prescribes seven months as the maximum period during which tariffs proposing changes in rates and charges can be suspended while the Commission is proceeding with its hearing and decision concerning their lawfulness; and it entrusts to the Commission the function of deciding whether that statutory suspension should be exercised. But the suspension power created and occupied by Section 15 (7) by its terms applies only to suspensions "pending such hearing and the decision" of the Commission. This section in no way addresses itself to or circumscribes the power of either the Commission or the courts to suspend, enjoin, defer or otherwise preclude the assessment of the new rates and charges after the "hearing and the decision" by the Commission. Thus, assuming that Section 15 (7) completely controlled the suspension of rates and

charges during the period while this case was heard and an administratively final decision was being issued by the Commission, by its own terms it clearly does not purport to prescribe or control the power to suspend rates and charges after the Commission's decision, as was here done by the Court below.

The Commission's argument evidences an utter misconception of the nature of Section 15 (7) proceedings. It argues that at this stage "the new charges have by no means been adjudged unlawful" and, therefore, no tribunal, either Commission or court, has the power under the "statute [Section 15(7)]" to prevent the assessment of "the new charge unless and until it is finally adjudged unlawful" (Com. J.S. pp. 9-10). But Section 15(7) does not require an affirmative finding that the rates are "unlawful" before the power ripens to proscribe the continued assessment of the rates. It specifies rather that where, as here, a "change" in rates and charges is involved, there shall be a "hearing" at which "the burden of proof shall be upon the carrier to show that the proposed changed rate . . . [or] charge . . . is just and reasonable." In case initiated under Section 15(7) the Commission concludes after the hearing either that the proposed rates and charges "have been shown to be just and reasonable" or simply that they "have not been shown to be just and reasonable" and are ordered canceled.* The Commission itself has thus consistently recognized that the finding of a failure to meet the burden of proof by the carriers, rather than a positive showing of unlawfulness, is all that Section 15(7) requires to ripen the power to render the rates ineffective.

Here, the Commission had held the full hearing granted by Section 15(7) and had issued an administratively final

* See, for example, *Demurrage Rules and Charges, Nationwide*, 339 I.C.C. 655, 668 (1971), and similar conclusions in like cases at 339 I.C.C. 500; and 337 I.C.C. at pp. 35, 516, 541, 782 and 806.

decision on September 21, 1971 that the charges were shown to be just and reasonable. The Court set aside that conclusion because the Commission erroneously construed the type of proof in this kind of case and the carriers had not submitted the evidence required to meet that burden. As a result, the Court has concluded that the railroads did not meet their burden of proof at the hearing and has implemented the relief precisely appropriate in a case, as here, where the carriers failed to meet their burden of proof in a hearing conducted under Section 15(7). The Court was not required to find the rates and charges unlawful. Under Section 15(7) a conclusion of failure to meet the burden of proof is all that is required as a predicate for ordering the rates out of effect. Since the carrier did not meet the burden of proof, the Commission was required by statute to order the carriers to cease and desist from further collecting the changed rates and charges; and the Court, which so corrected the Commission's decision, had the power to order the same relief, without prejudice to a possible future order of the Commission based upon a lawful finding that the burden has been met after further hearing.

The timetable in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963), was crucially different from that involved here. At the time the injunctive relief was sought in *Arrow* the Commission's seven month-suspension period had elapsed and the Commission had not as yet reached a decision. This Court there stated the issue before it as:

> The problem [is] . . . whether the application of new rates might be stayed pending decision [by the Commission] as to their lawfulness. (p. 663).

Then, reasoning that multiple individual court actions against only certain of the rates and charges involved in a new proposal while pending before the Commission before decision would interfere with the "uniformity" of the

"timing" of rate changes and finding "a close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates", this Court held that Section 15 (7) precludes judicial injunction while the Commission has not yet reached its decision (p. 668). In so ruling, however, this Court drew a sharp contrast between the lack of judicial power to enjoin or suspend before an administratively final decision by the Commission, on the one hand and, on the other, the power to grant injunctive relief which it specifically recognized as vesting in the district courts upon review of a Commission decision:

> A court's disposition of an application for injunctive relief [before the Commission has issued a decision] would seem to require at least some consideration of the applicant's claim that the carriers proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain. Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review. These considerations explain why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission. If an independent appraisal of the reasonableness of rates might be made for the purpose of deciding applications for injunctive relief, Congress would have failed to correct the situation so hazardous to uniformity which prompted its decision to vest the suspension power in the Commission. Moreover, such a procedure would permit a single judge to pass before final Commission action upon the question of reasonableness of a rate, which the statute expressly entrusts only to a court of three judges reviewing the Commission's completed task.[22] (pp. 669-670).

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[22] Thus we do not reflect in any way upon decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending

> review of an agency's action through the prescribed statutory channels Cf. e.g. Scripps Howard Radio v. F.C.C., 316 U.S. 4; West India Fruit & S.S. Co. v. Seatrain Lines, Inc., 170 F.2 775; Board of Governors v. Transamerica Corp., 184 F.2 311. Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action, and has never been recognized in derogation of such a clear Congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act.

Thus, rather than presenting a "square conflict" with *Arrow*, as claimed by appellants, the function of the Court below, in reviewing the Commission's administratively final decision, setting it aside, and issuing appropriate injunctive relief was expressly contemplated and approved in the *Arrow* case by this Court.

The power of the courts to issue injunctive relief against new rates and charges after the Commission has reached an administratively final decision has been well recognized in other cases.

In *Ad Hoc Com. on Consumer Protection* v. *U. S.*, 313 F. Supp. 119, 124 (D, D.C., 1970), a three-judge District Court temporarily enjoined increased rates which had gone into effect following the expiration of the statutory suspension period where the Commission had made its investigation under section 15(7) and issued a decision approving the rates. Initially, the judge to whom application had been made for a temporary restraining order had declined to grant it on the basis of lack of jurisdiction, citing *Arrow*. On Appeal, the Circuit Court of Appeals for the District of Columbia remanded the matter to the District Court to convene a three-judge Court to hear the request for injunction and held that the court's power to grant temporary relief was:

> (N)ot limited by *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 US 658, on review of a final order of

> the Commission . . . *Arrow* concerned unwarranted judicial intrusion prior to the exercise of administrative expertise; here the Commission has investigated and approved the tariffs in question and thus has completed its function subject to a possible motion for reconsideration under 49 USC § 17 (1963). The convening judge in exercising his discretion may consider the order of Docket No. 8486 sufficiently final for purposes of *Arrow*. (313 F. Supp., at p. 124)

To the same effect is *Cantlay & Tanzola* v. *U. S.*, 115 F. Supp. 72 (S.D. Cal., 1953). There the court similarly recognized that courts can not suspend or otherwise enjoin rates prior to a decision by the Commission and then upheld:

> the inherent equitable power (of the court), following final hearing and determination of the action, to award injunctive relief "ancillary to setting aside the order of the Commission . . . in order to carry out the purpose of Congress to make the judicial review effective." (citing *Pittsburgh G. W. Va. Ry. Co.* v. *U. S.*, 281 U.S. 479 (1930); *Inland Steel Co.* v. *U. S.*, 306 U.S. 153 (1939); and *Central Kentucky Gas Co.* v. *Railroad Co.*, 290 U.S. 264 (1933).

Thus, appellants claim that there is presented here a substantial question of interpretation of section 15(7) is unfounded; the *Arrow* case not only fails to sustain appellants contention but is directly to the contrary on the issue here raised; and decisions of this and other courts are uniform in upholding the ancillary power of the district courts to issue injunctive relief against rates upon setting aside an agency decision which approved them.

Against this well-founded body of precedent, appellants cite only *National Small Shipments Traffic Conference, Inc.* v. *U. S.*, 321 F. Supp. 500, 515 (S.D.N.Y. 1970). There, without citing any reasons or precedent (other than *Arrow*, which it recognized as distinguishable), that court negated

the judicial power to enjoin rates after a final Commission decision. But the statements there concerning the power of courts to enjoin rates were *dicta*, inasmuch as that court had only been asked to "permanently enjoin the Commission's order"* and had not been asked to enjoin the rates (p. 513). Thus, the comments in *National Small Shipments* concerning lack of judicial power to enjoin rates upon setting aside a Commission decision represent an excursion into a point which was not raised for its decision and which had neither been briefed nor argued by the parties. While the distinction can also be drawn that there the carriers were not parties to that case and were beyond the court's jurisdiction, the *dictum* in *National Small Shipments* on the judicial power to enjoin rates was clearly wrong and directly contrary to the rule of law as correctly acknowledged by this Court and followed consistently in the decisions cited *supra*.

The wisdom of the rule of law is well illustrated in the instant case. Here the railroads were admittedly seeking to establish a penalty charge for the express purpose of imposing an absolute barrier against grain inspection and thereby destroying the grain marketing system and injuring small businesses engaged in selling inspected grain. If the Court below had simply remanded the matter to the Commission, allowed the charges to remain effective and the Commission elected to hold a further hearing to give the railroads a fresh chance to present evidence they eschewed at the first hearing, the mere passage of time

*A "permanent injunction" would be inimical to a remand and would effectively terminate the entire litigation. In the instant case the court below has remanded the case to the Commission for further proceedings and, in so doing, its action is consistent with the holding in *National Small Shipments* on the issue raised there.

would allow the railroads to accomplish their objective regardless of the ultimate outcome of the case. A period of two to four years normally passes before the Commission issues a decision after remand in cases where further hearings are held. If the Commission were to hold that the railroads again had not sustained the burden of proof as interpreted by the Court below, there would be no "refunds" possible to those most injured by the continuing effectiveness of the rates, i.e., those precluded from inspections by the economic barrier of the charge. The gravity of the situation can be readily perceived from the fact that, during the first six months of their existence, these penalty charges were so effective that the frequency of inspections had already dropped from 60 percent of the cars to only 25 percent (footnote p. 8 of Railroads J.S.).

Moreover, on those cars on which inspections are being made and charges paid by the shippers, the buyer deducts the penalty charge from the payment to the farmer and, since he is not the shipper-payer of the charges, the farmer would not receive the putative refunds from the railroads.

Under the circumstances presented, the remedy for the Court below, sitting as a court of equity, was clear. If as we insist, the Court was correct in holding that the railroads had failed to meet their statutory burden of proof, the Court properly granted the relief which the Commission was obliged to grant in the case had it applied the correct burden of proof, i.e., cancellation of effectiveness of the tariffs. To be sure, under such circumstances the Commission, upon its own election or upon petition of the carriers, could afford the railroads a further hearing at some future date to give them an opportunity to submit the type of evidence necessary to meet their burden. But this

avenue would be available whether the Commission itself had found the failure to meet the burden or, as here, the Court first discerned the failure. But in either event the railroads had rested their case, an administratively final decision had been reached and they had failed to meet their burden. In either case, whether the Commission had properly concluded there was a failure of proof or whether the Court had to make that legal conclusion for it, the remedy indicated is the same, i.e., the rates must not remain in effect because the railroeds failed to show that they are just and reasonable.*

II.

THE COURT BELOW APPLIED THE CORRECT STATUTORY INTERPRETATION IN SETTING ASIDE THE COMMISSION'S DECISION.

The Commission does not challenge the merits of the opinion of the Court below in setting aside its finding that the railroads had shown their proposal to be just and reasonable. This should be sufficient indication that there is no substantial question as to the correctness of the Court's decision.

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* Indeed, a few weeks after the remand in the *National Small Shipments* case the Commission itself entered a brief order directing immediate cancellation of the rates (then in effect) for the given reason that the court had found the carriers failed to meet their burden of proof; and provided for a further hearing. In order to give solace to the railroads here, the Commission is arguing from *Arrow* that after remand neither the courts nor the Commission has the power to suspend or enjoin rates beyond the section 15(7) seven month-period, despite the fact that it has exercised this power itself. But Commission recognition that section 15(7) in no way circumscribes the remedy available after hearing and decision is implicit in its own post-remand order in *National Small Shipments*.

The railroads assert that the Court below erroneously interpreted the statutory requirements of proof in a case where the proposal involved would create a new charge for a service already provided and compensated under the existing linehaul rates. The Court held that under these circumstances the railroads' burden of proof* required showing that the linehaul rates plus the additional new charge would *in toto* be just and reasonable; and further held that the Commission had misinterpreted the statutory requirements here by concluding that, because of the difficulty of presenting such evidence in a case of broad impact involving thousands of rates, the railroads were not required to meet that statutory burden.

The short answer to the railroads' assault on the merits of the opinion of the Court below is that it is the well settled statutory interpretation that, where a new charge would be imposed in addition to linehaul rates already embracing the service involved, the carriers must show by evidence that the combined total charge would be just and

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* Section 1(5) of the Interstate Commerce Act [49 U.S.C. § 1(5)] provides that:

> all charges made for any service rendered or to be rendered in the transportation of passengers of property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

And Section 15(7) of that Act [49 U.S.C. § 15(7)] provides that in cases where carriers propose to "change" their rates and charges:

> the burden of proof shall be upon the carrier to show that the proposed changed rate, charge, . . . or practice is just and reasonable.

Here, the railroads proposed to change the charge for the complete service by imposing an additional charge, thus placing in issue the reasonableness of the changed total charges.

reasonable. In *Secretary of Agriculture* v. *U.S.*, 347 U.S. 645, 654, this Court, in setting aside the Commission's decision noted the "prevailing rule" with approval that a service encompassed by the linehaul rate cannot be separately restated without examining the sufficiency of the linehaul rate to cover it. That statutory interpretation has since been adhered to consistently by the Commission and the courts, most recently in *Transit Charges, Southern Territory,** 332 ICC 664 (1968), order sustaining in *Cin. N.O. & T.P.R. Co.* v. *U.S.* (unreported) (S.D. Ohio, 1970), aff'd *per curiam* 400 U.S. 932 (1970).

In the instant case the railroads stipulated that the linehaul rates had been so made over the years as to include specifically compensation for the cost of the inspection service. That is the reason why they never even essayed to prove that the total of such line-haul rates and the additional charge would be just and reasonable; or that the line-haul rates, if restricted to cover less than the full services which they embraced, would nevertheless be just and reasonable. They now argue that this utter failure of proof on their part was somehow excusable here, not because they have a statutory exception to that burden in hard cases** (as the Commission found), but because the evidentiary burden was assertedly rendered inapplicable

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* The Commission there held:

The reasonableness of the proposal cannot be properly determined herein without reference to and consideration of, the linehaul rates, the services furnished thereunder, and the cost thereof.

** What is required in cases where thousands of rates are involved is "typical evidence" and not a complete presentation as to all or even as to most rates. *New England Divisions Case*, 261 U.S. 184, 197.

here because the Commission found that they were not proposing to add the charge onto any of those crates which were held to be a maximum level by the Commission in 1935.

Thus, the railroads here argue that the Commission's pivotal finding that they were not required to meet their burden of proof because of the number and variety of grain rates involved was only a "dictum", notwithstanding that the Commission itself regarded that circumstance as "important" (A. 32). They then argue that the Commission's finding that the proposed charge was restricted in such manner that it would not, if added to the rates, combine to exceed the level of the rates prescribed in 1935 in *Grain and Grain Products,* 205 I.C.C. 301, plus all intervening general rate increases was such a distinguishing feature as to relieve them of their burden of proof. The Court below correctly held that this was not such a distinction as to remove the railroads' burden of producing substantial evidence typical in nature to show that the combined line-haul rates and charges and the line-haul rates minus the service previously covered would be just and reasonable. That statutory burden of evidentiary proof is not rendered inapplicable to this situation merely because the resultant rates and charges would not exceed certain rates (1) prescribed over 35 years ago; (2) conceded by the railroads to be "paper rates" which have been kept in their tariffs but move no traffic; (3) increased over 100 percent above the rates prescribed in the 1935 decision; and (4) bearing no demonstrated relationship or resemblance to the somewhat lower rates on which the grain traffic actually moves to-

day.* The Court below correctly held that, in a case where there is a statutory burden of producing evidence of justness and reasonableness, the Commission must require and consider substantial and current evidence as to the rates actually moving the traffic and can not satisfy that burden by the spectre of a 35 year-old ghost.

For the reasons above stated, the order of the district court should be affirmed.

Respectfully submitted,

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* The Commission has frequently recognized that where a lower level of rates has supplanted a maximum level authorized at some time in the past, the new level is the standard which must be applied in determining whether rates exceed a just and reasonable level. *Sugar from Gulf Coast Port groups to Northern Points*, 220 I.C.C. 623 (1937), 234 I.C.C. 247 (1939); *Geo. A. Hormel and Company* v. *Atchison, T. & S. F. Ry. Co.*, 263 I.C.C. 9 (1945); and *French Lick Springs Hotel Co.* v. *Chicago, I. & L. Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 298 I.C.C. 765, 771-72 (1956).